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IN THE

Supreme Court of the United States

October Term, 1947

No. 349

WALTER P. GARDNER, Trustee of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
A Debtor-Petitioner,

vs.

THE STATE OF NEW JERSEY,
A Creditor.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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THE STATE OF NEW JERSEY,
A Creditor.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Walter P. Gardner, Trustee of The Central Railroad Company of New Jersey, a debtor corporation in bankruptcy under Section 77 of the Bankruptcy Act, petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit reversing Order No. 260 of the United States District Court for the District of New Jersey sitting in bankruptcy.

Jurisdiction

Judgment of the Circuit Court of Appeals was entered July 15, 1947. The opinion of the Circuit Court of Appeals is not yet reported. A copy, however, is included in the record on file. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code; 28 U. S. C., Section 347(a) as amended by the Act of February 13, 1925.

The Nature of the Proceedings

This case is a sequel to the decision in *Gardner* v. *New Jersey*, 329 U. S. 569. For the second time in succession the Circuit Court of Appeals has denied the jurisdiction of the Bankruptcy Court to decide an important issue in the proceedings of this debtor, and this time after having the guidance of this Court.

Petitioner is the surviving trustee of The Central Railroad Company of New Jersey, an interstate railroad which is in reorganization in the District Court of the United States for the District of New Jersey under Section 77 of the Bankruptcy Act. Debtor's petition for reorganization was filed on October 30, 1939.

The subject of this litigation is a claim formally filed by the State of New Jersey in the Bankruptcy Court on December 10, 1940, for the balance of taxes plus penalties alleged to be due for the years 1932 to 1939, inclusive. After the State had invoked the jurisdiction of the Bankruptcy Court by filing its claim, the Trustees filed detailed objections thereto, questioning on numerous grounds, the amount and legality of the principal sum claimed as well as of the penalties. One of the objections to the amount claimed was that it had been compromised for the amount specified in the so-called Tax Settlement Acts.

While the Special Master was hearing and considering the question of the jurisdiction of the Bankruptcy Court to determine the objections that had been made by the trustees and bondholders to the State's claim for taxes, the Attorney General of New Jersey, on December 5, 1944, served on the trustees a petition and notice of motion for an order granting the Attorney General leave to join the trustees of the debtor in an action to be instituted in the courts of New Jersey for a declaratory judgment to determine one of these objections, to wit:—whether the debtor and its trustees entered into a contract with the State of New Jersey pursuant to the provisions of Chaper 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, and whether such contract is binding on the parties thereto (Appellant's App. 134a, 135a).

The District Judge, after argument on this motion on December 11, 1944 and December 18, 1944 (Appellant's App. 137a-216a), signed Order No. 260 which, after reciting the motion and the hearing of argument by all parties in interest, provided:

> "And it appearing to the Court that to grant the relief prayed for in said petition would result in further and prejudicial delay in the hearing and adjudication of the State's claim and in the reorganization of the debtor and would not be in the public interest or in accordance with the intent of Congress in enacting Section 77 of the Bankruptcy Act;
>
> "It is, on this 18th day of December, 1944, ORDERED that the aforesaid motion be and the same is hereby denied" (App. 217a).

The Attorney General immediately appealed (App. 223a), alleging abuse of discretion by the District Judge (App. 218a).

Hearing of this appeal was deferred until the decision of this Court in *Gardner, Trustee* v. *New Jersey, supra*, which was decided by this Court on January 20, 1947.

The Circuit Court, in the decision to which this petition for certiorari relates, reversed the Bankruptcy Court. Seemingly disregarding the fact that the matter involved was the adjudication of a claim which the State had filed in the Bankruptcy Court and that the immediate question was whether the State had agreed to compromise the claim under Section 27 of the Bankruptcy Act, the Circuit Court apparently concluded that there was no abuse of discretion (see page 5 of the opinion), which was the question argued by the parties on appeal, but went further and held that that Court had erred as a matter of law in not automatically granting the State's motion on the theory that owing to the decree that had been entered by the Chancery Court of New Jersey in *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, the District Court was forbidden to decide whether the State's offer could have resulted in a valid compromise.

Because of the wholly erroneous concepts of the majority of the Circuit Court of Appeals (see, in particular, Footnote 2, p. 6), it is necessary for us to point out the following essential facts which are referred to in the decision of this Court in *Gardner, Trustee* v. *New Jersey, supra.*

The State, on December 10, 1940, voluntarily filed in the reorganization proceedings its Proof of Claim No. 38, claiming that there was due to it for property taxes and interest assessed against the debtor for the years 1932 to 1939, inclusive, a balance of $19,849,790.21, plus additional interest, after payments on account had been made by the debtor before bankruptcy aggregating $18,128,962.82 (App. 75a).

The trustees and bondholders committees both filed objections and supplemental and amended objections to

this claim (App. 84a, 94a), to which objections the State filed a reply (App. 102a) asserting therein that under the New Jersey statutes the taxes assessed in each year bear interest from the date payable in each year until payment at the rate of one percent per month (App. 103a, Par. 2).

The Tax Settlement Act of 1941, Chapter 290, was passed by the Legislature and approved by the Governor on July 22, 1941. The trustees, on August 8, 1941, filed their petition with the court for instructions and for directions to them to compromise the claim of the State (Tr. App. 544a). The court in Order No. 123 authorized the trustees to compromise the State's claim for taxes (Tr. App. 552a). The form of undertaking executed by the trustees and delivered to the State, whereby the trustees agreed to pay the State its taxes in the way and manner required by Chapter 290, P. L. 1941, appear at Tr. App. 548a-551a. While the Attorney General failed to approve the form of the settlement papers, they were nevertheless executed and delivered on August 11, 1941 to and retained by the State Comptroller and State Treasurer respectively, without any disapproval of such forms by the Attorney General. The forms were approved in Order No. 123 dated August 8, 1941 (Tr. App. 552a).

On November 21, 1941 the trustees filed a petition with the District Court for instructions whether they should pay on or before December 1, 1941 taxes for the year 1941 that became due and payable on that date. This petition contains the recital that in compliance with Order No. 123 the trustees had filed with the Comptroller their undertaking to pay the State the taxes asserted to be due for the years 1932 to 1940, inclusive, with interest as prescribed by the Tax Settlement Act, and filed with the State Treasurer a waiver of all rights to contest the legality of all assessments made prior to December 1, 1941 and stipulations and consents to the discontinuance of the ap-

peals pending before the State Board of Tax Appeals for 1939, 1940 and 1941, and that:

> *"Up to this date, neither the trustees of the debtor nor the debtor have received any communication advising that said tender has been rejected nor have the certified checks tendered and delivered to the Treasurer of the State of New Jersey on August 11, 1941 been returned"* (Tr. App. 562a).

On the filing of the last mentioned petition the court required notice to be given to all parties.

A hearing was held November 24, 1941, the Attorney General not appearing (Tr. App. 566a). After such hearing the court made Order No. 135, which recites the giving of notice of the hearing and determines that the trustees had taken all the steps necessary on behalf of debtor's estate to comply with Chapter 290, P. L. 1941:*

> "That no objection has been made either by the Comptroller, or the Treasurer, or the Attorney General of the State of New Jersey to the trustees of the debtor, or to the debtor, or to any of said affiliated companies, or to this Court, as to the validity or form of any of the tenders, undertakings, waivers or stipulations filed by the trustees, to comply with said Chapter 290 on behalf of debtor's estate, etc."

The court thereupon ordered that the trustees pay to the State the 1941 taxes in full (Tr. App. 574a), and they were accepted by the State.

It was on September 4, 1941, *three weeks after the trustees had on August 11, 1941 filed their undertakings, waivers, etc.*, with the State Treasurer and State Comptroller, that the Attorney General commenced his information suit in the Court of Chancery attacking the constitutionality of the Settlement Act (App. 55a, Par. 16).

On May 21, 1942, the Governor approved Chapter 241, P. L. 1942 (Tr. App. 685a), which amended the Tax Settle-

* Printed in full, Tr. App. 680a.

ment Act of 1941. This act was in the form of an offer of compromise by the State to any railroad taxpayer "or the duly appointed and qualified receiver, receivers, trustee or trustees thereof" (Tr. App. 693a). The forms of acceptance and waiver, discontinuance and dismissal are contained in Sections 7 and 8 of this statute (Tr. App. 690a, 691a). This statute did not require any action of any kind by any State Officer. The day this act was approved by the Governor the Attorney General filed a supplemental civil information action and secured an injunction restraining the State Treasurer from accepting any payments under the terms thereof. The trustees, on June 2, 1942, filed with the court a petition for instructions whether they should comply with this law (App. 10a). The State and all other parties were required to show cause why the prayer of the petition should not be granted. On June 12, 1942 Order No. 163 was made directing the trustees, among other things, to comply with the amended Tax Settlement Act (App. 21a).

On June 22, 1944, the Court of Errors and Appeals, in *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244, by a vote of ten to four, affirmed the decree of the Court of Chancery and held that the Tax Settlement Acts were void as in violation of Article 1, Par. 20 of the State Constitution, which provides that:

> "No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association or corporation whatever."

The decision gave no new construction to the New Jersey Constitution but followed the prior decisions in *In re Voorhees*, 123 N. J. Eq. 142, 121 N. J. L. 594, and 124 N. J. L. 35, which had held that a gift by the state to a private party was repugnant to the above quoted constitutional provision. The decree was based on this well settled principle of state law and on a finding of fact that

there was no consideration for the offer contained in the Settlement Acts.

This decision was placed squarely on the ground that the proofs did not show that the remission, cancellation and abatement of the delinquent interest (on taxes assessed against all railroads in the state) was supported by "legal, equitable or moral consideration." 135 N. J. Eq., at page 253. It is important to indicate that although on the State's initiative, a sharp issue of fact as to what amount was due on the State's tax claim was then pending in the Bankruptcy Court, the Attorney General made no application to the Bankruptcy Court to make the trustees or debtor parties to the chancery suit and obviously did not advise the State court of the existence of this issue or of the jurisdiction of the Bankruptcy Court to deal with it. Furthermore, the *Wilentz* case was decided on ex-parte affidavits and a stipulation of facts between the Attorney General and the State Treasurer. No witness was submitted to examination or cross-examination in open court by anybody. 133 N. J. Eq. 447; 135 N. J. Eq. 261.*

It was on August 14, 1944, within two months after the decision of *Wilentz* v. *Hendrickson* by the Court of Errors and Appeals that the Trustees filed in the Bankruptcy Court their "Petition for Adjudication Concerning New Jersey Tax Claims," App. 47, *et seq.*, which raised the questions decided in *Gardner* v. *New Jersey*, at the last term of this court, and fundamentally was the reason for the filing of the Attorney General's petition and motion on which Order 260, now under consideration, was made. It is obvious that the interminable litigation over the State's tax claims has been due to the State's insistence, concurred in twice by the Circuit Court of Appeals, that the Bankruptcy Court is without jurisdiction to decide the questions raised in proceedings there pending.

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* The decision in *State* v. *Erie R. R. et al*, 23 N. J. Misc. 203, on which the Circuit Court seems to place much reliance, was also decided on a stipulation of facts. Neither the Trustee nor the Debtor was a party.

The Decision Below

The Circuit Court of Appeals, with a dissenting opinion by Judge Goodrich, held that the decree in *Wilentz* v. *Hendrickson, supra,* an action in which neither the Debtor nor the Trustee was a party, and where the Attorney General was informant and the State Treasurer, alone, was defendant, is binding and conclusive on the debtor and its trustee and the whole world. It held that in the face of the State's decree enjoining the State Treasurer from accepting any payments under the Settlement Acts, the Bankruptcy Court is powerless to make an effective order, and that the Chancery Court decree affirmatively deprives the debtor of the rights and benefits of its compromise with the State of the State's tax claims, although this court in *Gardner* v. *New Jersey* had held this was one of the questions that might be decided by the Bankruptcy Court.

The Circuit Court further held that the *only* question at bar is whether there was a valid contract made between the Trustee and the State *under the Settlement Acts,* and that since the Bankruptcy Court could not change the chancery decree, "only by reference to that State forum (the Court of Chancery) can the problem be solved after which the injunction may be lifted to permit payments under contract or may be safely left intact because there is no contract".*

Disregarding this Court's opinion in *Continental Ill. Nat'l B. & T. Co.* v. *C. R. I. P. R. Co.,* 294 U. S. 648, 677, although citing it, the Circuit Court held that both the District Court and counsel for both parties were in error in treating this case as calling for the exercise of judicial discretion as to whether the issues involved should be referred to the State Courts for decision. It held that *only the New Jersey Court* could effectively de-

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* For a more extended analysis of the Circuit Court's opinion, see Point IV of appended brief, page 36.

cide the issue involved and that the action of the District Court in denying the Attorney General's petition was an error of law. Judge Goodrich, in his dissent, points out that the question involved might be

> "for one tribunal or the other. If the matter is one of discretion, that discretion is lodged in the District Court and not ourselves. We should uphold the action taken there unless we find that the exercise of discretion is not legally supportable" (Opinion p. 17).

He points out that the decision of the majority was not well taken when it determined that the Bankruptcy Court had somehow been deprived of authority which it otherwise has by the injunction in *Wilentz* v. *Hendrickson*, saying:

> "It needs no argument to establish the point that a statute passed by the Congress pursuant to a power granted it by the constitution becomes the supreme law of the land. The effective operation of this power is surely not to be interfered with by orders made in the intra-state operation by State governments in whatever functions they may be at the time performing" (Opinion p. 18).

Judge Goodrich's first point of dissent was from the decision that discretion was not involved. His second reason for dissent was because he thought:

> "the majority announces a very dangerous doctrine. It is inconceivable to me that the exercise of federal function by the Court acting under a statute in turn resting on a constitutional grant of power, can be interfered with by the fact that a State court has previously enjoined somebody from doing something" (Opinion p. 19).

Questions Presented

1. Is not the jurisdiction of the Bankruptcy Court so far as the compromising of any controversy arising in the administration of an estate is concerned, exclusive so as to require that the Bankruptcy Court, and it alone, pass upon all questions relating thereto, since this power is derived from Section 27 of the Bankruptcy Act, which is based on the Constitution?

2. Where Congress, in the exercise of its constitutional powers, has conferred upon the Bankruptcy Court jurisdiction to authorize the compromise of any controversy arising in the administration of an estate, are not such powers exclusive within the field in which Congress has acted and exclude the jurisdiction of any state to interfere therewith?

3. Is it a proper exercise of the jurisdiction of the Circuit Court of Appeals, conferred by 28 U. S. C., Sec. 225(c) (Judicial Code, Sec. 128 as amended); and 11 U. S. C. Sec. 47, to direct a trustee in bankruptcy to submit one objection to the allowance of a State's claim for taxes to a State court, and retain in the Bankruptcy Court, for later trial and decision, other objections to the claim with inevitable, interminable and unnecessary delay in the reorganization of the debtor?

4. Is it not error for a Circuit Court of Appeals, after reorganization proceedings have been pending for almost eight years, to refer one question incidentally, as it assumed, involving State law, to a State court for decision respecting a State's claim for taxes, when at the same time there are numerous other objections to the State's claim which must later be determined in the Bankruptcy Court should the State Court not decide completely in favor of the trustee.

5. Did not the Circuit Court err in concluding that the District Court had "no reasonable choice of alternatives upon which discretion could be exercised," when the substantive issue which the District Court refused to refer to a State Court was a mere issue of fact as to whether there existed considerations to support the State's offer of compromise?

6. Did not the Circuit Court err in holding that the Bankruptcy Court could not decide whether there had been a valid compromise of the State's claim on the ground that its decision could not be enforced without contravening a decree in the State Court against the State Treasurer?

Summary Statement of Matters Involved

The controlling facts in a nutshell are these:

The State had filed a very large claim for taxes and penalties. The Trustees and bondholders filed objections to this claim, the principal ones being:

(a) That the claim had been compromised and the State had been paid in full.

(b) That if it should be held that there was no compromise, then the payments made on account after bankruptcy by the Trustee, aggregating over $18,000,000, should be credited first to taxes rather than penalties, in accordance with the orders of the Bankruptcy court, rather than ratably between penalties and principal according to state law.

(c) That if any balance then appeared to be due on the State's claim, the Bankruptcy Court should adjudicate the amount remaining due with proper regard to the

equities that had arisen from actions taken by the Trustees, under instructions of the Bankruptcy Court and in reliance on the Settlement Acts, before the decision in *Wilentz* v. *Hendrickson* (*supra*).

(d) That any penalty interest included in the State's claim should be disallowed by the Bankruptcy Court in view of the provisions of Section 57 (j) of the Bankruptcy Act; that no interest should be allowed after the petition was filed, and in no event should more than interest at the rate of 6% per annum be allowed.

(e) That if finally any amount is found to be due to the State, to what assets of the Debtor does the State's lien attach and does such lien have priority over the lien of the mortgage securing the Debtor's bonds as to the various assets of the Debtor.

It thus appears that there are five major questions of vital importance concerning the State's claim, each of which can only be finally decided by the Bankruptcy Court and over which no other court can possibly have jurisdiction.

The Circuit Court of Appeals, in its opinion, says:

> "The only question at bar is whether there is a valid contract under the State Act, as the Debtor contends."

The Trustee contends that he has under valid orders of the Bankruptcy Court compromised the State's claim filed in the bankruptcy proceeding.

It is true that the petition filed by the Trustees for approval of the compromise as well as the petition for adjudication referred to a contract of settlement with the State, in accordance with the terms of the Tax Settlement Acts. If a contract was consummated, however, it was obviously a compromise consummated under Section 27 of the Bankruptcy Act and the State Statute entered into the matter only by way of providing the ways and means by which the claim filed by the State might be compromised.

The power of the Bankruptcy Court to compromise such a claim is given by Section 27 of the Bankruptcy Act, 11 U. S. C. 50, which provides:

> "The Receiver or Trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

The basis for settlement of the claim of the State which was presented to the court by the Trustees was a compromise in accordance with the provisions of the Tax Settlement Acts under said Section 27 of the Bankruptcy Act. The Bankruptcy Court had full and complete jurisdiction to entertain such a compromise under said section.

The Circuit Court of Appeals has ruled as a matter of law that the question of compromise cannot be decided by the Bankruptcy Court and that the decision on all other questions involved, as raised by the Trustees' objections to the State's claim, over which questions this court has held that the Bankruptcy Court has exclusive jurisdiction, must await the decision of the State Court on the validity of the compromise. Such decision certainly seems to be directly in conflict not only with *Gardner* v. *New Jersey, supra,* but also with *Public Utilities Commission* v. *United Fuel Gas Co.,* 317 U. S. 456; and *Continental Illinois B. & T. Co.* v. *C. R. I. & P. Co.,* 294 U. S. 648.

REASONS WHY WRIT OF CERTIORARI SHOULD ISSUE

FIRST: The Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

A

In *Gardner* v. *New Jersey, supra,* this Court said:

> "We only hold that the reorganization court could properly entertain all objections to the claim (of the State) except those involving the valuations underlying the assessments and the validity of those assessments." 329 U. S. 565 at 584.

The Circuit Court of Appeals has held that the question whether or not there was a compromise of the State's claim is "A question which only one court can effectively decide",—that is, the State court.

Without the benefit of any proofs, Master's report or District Court decision which this Court in its opinion (*supra*) called for, the Circuit Court held that the trustees' efforts to comply with the Tax Settlement Acts were "vain" (page 2) and that "The existing Chancery decree affirmatively deprives the debtor of the rights and benefits of its alleged contract with the State".

The decision of the Circuit Court is unprecedented. The question submitted by the appeal and briefs and argued by the parties was whether or not the Bankruptcy Court had abused its discretion in denying the State's motion for an order granting the Attorney General leave to join the trustees of debtor in an action to be instituted in the courts of New Jersey for a declaratory judgment to determine whether the debtor and its trustees had entered into a contract with the State pursuant to the

provisions of the Settlement Acts, and whether such contract is binding on the parties hereto.*

The Circuit Court of Appeals instead of deciding the question briefed and argued before it held that "In this situation, we do not find it necessary to decide whether or not there was an abuse of legal discretion by the District Court. There was an error of law."

The opinion does not specify what error of law the court had in mind, although this court in *Gardner* v. *New Jersey* clearly indicated that judicial discretion was involved. The Circuit Court reversed the District Court's order, and in effect directed that the question whether or not a compromise of the tax claim was consummated should be referred to the New Jersey Court of Chancery for decision. The opinion frankly concedes that the court's action is "unusual." The court cites *Union Tool Co.* v. *Wilson*, 259 U. S. 107, for the proposition that the exercise of discretion cannot justify the failure of the court "to apply well-settled law to a conceded state of facts", and *In re Sobol*, 242 Fed. 487, for the proposition that such a failure constitutes a reversible error of law. The court, however, gave no indication as to what principle of law it deemed to be "well-settled" or what state of facts it deemed to be "conceded".

Both the law and the facts involved in this litigation are sharply in issue. In the *Tool Company* case, *supra*, and the *Sobol* case, *supra*, as the opinions make clear, the controlling principles of law were well-settled and the pertinent facts were indisputable. In both of those cases it was clear that a court order had been violated, and in such a situation the settled law required a finding of contempt. No question of discretion was presented. Here, as the court itself, in another portion of its opinion,

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* This was the language of the Attorney General. The question involves not a contract pursuant to the Settlement Acts, but a compromise under Section 27 of the Bankruptcy Act.

recognizes: "A real controversy is presented between the parties * * *" (Opinion, p. 14).

The controversy is as to whether or not a compromise was effected, or, if not, whether rights had accrued to the debtor's estate under the facts and circumstances and under express provisions of the Bankruptcy Act and principles of equity, which the Bankruptcy Court should determine. How can it be deduced from the cases cited that a Bankruptcy Court having jurisdiction of such a controversy must automatically refer one of the questions involved to a State court on the application of the creditor whose claim is disputed by the trustee in bankruptcy?

Judge Goodrich in his dissenting opinion said:

> "It seems to me that the sole question in the case before us is whether the reorganization court committed reversible error in declining to order the debtor and trustees to become parties to litigation in the New Jersey State courts involving questions of whether, following the declaration of the unconstitutionality of the Settlement Acts, petitioner has rights growing out of conduct, or agreement, or what not, prior to that declaration" (Opinion p. 17).

It is submitted that the procedural question raised by the State's motion in the Bankruptcy Court was one peculiarly calling for the exercise of discretion.

B

The majority opinion of the Circuit Court reaches an anomalous conclusion. The opinion states (page 8):

> "In brief, if a decision of the court below on the substantive issues would contravene the existing injunction, the denial by that court of New Jersey's request to determine them in a state court was error. If such a decision would not contradict the injunction,

> the denial was correct, and the matter is one wholly of federal concern. Hence to decide whether the answers are the task of one jurisdiction or the other requires some inquiry into what the decision of the lower court would be. If the Acts are clearly void *ad hoc* and if there is clearly no contract to sustain the Acts' provisions, then the district court judgment is to be affirmed. Otherwise a reference to the state courts for a determination of the issues is inescapable."

In effect, the majority opinion holds that the Bankruptcy Court has power to determine the issues before it only if those issues can be decided in favor of the State but that if there is any possibility of the issues being decided adversely to the State, then the Bankruptcy Court has no power to adjudicate them.

This conclusion by the majority of the Circuit Court seems contrary to all accepted concepts of jurisdiction of a federal court. The jurisdiction or power to adjudicate an issue under our jurisprudence presupposes corresponding power to issue a decree in favor of either party, as the facts and the applicable law may warrant. In the words of Mr. Justice Holmes, "Jurisdiction is authority to decide the case either way". *The Fair Co.* v. *Kohler Specialty Co.*, 228 U. S. 22 at 25. The determination made by the majority of the court below, that jurisdiction may be exercised in favor of one party but may not be exercised in favor of the other, seems such a departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

This Court recently emphasized in *United States* v. *Standard Oil Co.*, 91 L. Ed. 1507 (Adv. Ops.), that while *Erie* v. *Tompkins*, 304 U. S. 64, requires that in diversity cases controlling effect must be given by federal courts to state law in matters of State interest, there is no warrant in

the law "for broadening state power over matters essentially of federal character."

The requirement of uniform national administration of federal statutes requires that the federal courts exclusively should administer federal law.

For all of the above reasons it is submitted that the issue presented by the State's motion was one peculiarly calling for the exercise of discretion; that the Bankruptcy Court exercised a sound discretion in denying the motion; and that, therefore, the Circuit Court's decision is erroneous and should be examined by this Court.

SECOND: The Circuit Court has decided an important question of Federal law which has not been, but should be settled by this Court.

The Circuit Court has held that when a trustee files objections to the allowance of a State's claim for taxes filed in the proceedings, asserting that with court approval he accepted an offer to compromise made by the State, the District Court must refer the question whether there has been a compromise to a State court for decision as soon as the State makes a motion to that effect.

Here the offer to compromise was made in two public statutes both passed by the Legislature and approved by the Governor, which are the most formal offers of compromise that a sovereign state can make. The trustees upon the passage of the first statute reported the offer of compromise to the court, which ruled that the offer be accepted. When the next Legislature passed and the Governor approved the second statute amending the first, the trustee with court approval accepted that offer and complied with it.

When the trustee, after the decision in *Wilentz* v. *Hendrickson*, *supra*, was announced, petitioned the court to determine whether the claim had been compromised and if not what amount should be allowed thereon, and

the nature, extent and priority of the State's lien, questions of federal law, and federal law only were thus presented to the Bankruptcy Court for decision.

Congress enacted the Bankruptcy Act pursuant to the express power given by Article 1, Sec. 8 of the Constitution. Section 2 of the Bankruptcy Act (11 U. S. C. Sec. 11) creates bankruptcy courts, "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * *." It gives them power to

> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." 11 U. S. C. A. Sec. 11(2), as amended June 22, 1938.

Section 77(c)(7) provides that the judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced; and Section 77(c)(13)(l) provides that:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors * * * shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 77(f) of the Bankruptcy Act, 11 U. S. C. Sec. 205(f), provides:

> "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, *the laws of*

any state or the decision or order of any state authority to the contrary notwithstanding.'' (Italics ours.)

Congress has so completely taken over jurisdiction of bankruptcy matters that it required the provisions of Section 67(7)(e), 11 U. S. C. A. Sec. 107, to give concurrent power to state courts to entertain suits for the recovery of assets and set aside fraudulent transfers.

So complete is this power that upon the filing of a petition in bankruptcy state courts then administering jurisdiction over the bankrupt must give way, and even the fees of officers of the state court must be allowed and ordered paid by the Bankruptcy Court.

Straton v. *New*, 283 U. S. 318;
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734;
Gross v. *Irving Trust Co.*, 289 U. S. 342;
Bankruptcy Act, Sec. 2(21), 11 U. S. C. Sec. 11(21), as amended June 22, 1938, C. 575 Sec. 1, 52 Stat. 842.

Nevertheless the rule as now announced by the Circuit Court would surrender to State courts one of the powers (to allow claims) expressly conferred on courts of bankruptcy by Congress in Section 2 of the Bankruptcy Act. Even if the State court should attempt to decide the question, the Bankruptcy Court could ignore its decision under the express language of Section 77(f), ''the laws of any State or the decision or order of any State authority to the contrary notwithstanding''. This demonstrates the wisdom of the decisions in *Public Utilities Commission of Ohio* v. *Gas Company*, 317 U. S. 456, 463 and *Continental Illinois Nat'l Bank & Tr. Co.* v. *Chicago Rock Island & Pacific R.R. Co.*, 294 U. S. 648, and the futility of the decision below.

Side by side with the question whether there was a compromise under Section 27 of the Bankruptcy Act is a question of equity; whether, in view of the offer made by

the State in a public statute approved by the Governor, the action of the trustees in accepting the tendered offer of compromise, the concomitant filing of a written undertaking to pay the taxes as assessed in full, the discontinuance of all contests against taxes then pending in administrative tribunals and the courts as to some of which the debtor's estate has had no hearing and as to others of which there was no remedy under state law, and the making of payments on account that would not otherwise have been made, equities have arisen in favor of the debtor's estate that entitle it to have the State's claim allowed either in the amount fixed by the Tax Settlement Acts or such other sum as to a Chancellor would seem equitable and fair to all parties in interest. The virtue in such an equitable defense is shown by the decisions of *Trenton Street Railway Co.* v. *Lawler,* 74 N. J. Eq. 828; *Cutting* v. *Dana,* 25 N. J. Eq. 265; *Headley* v. *Leavitt,* 68 N. J. Eq. 591 (E & A); *Union Central Life Insurance Co.* v. *Insland,* 91 Fed. (2d) 365 (CCA 8th). Moreover, the recent decision of this Court in *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, illustrates the power and authority of the bankruptcy court over the allowance of interest on claims filed in the proceedings.

We have found no reported case where there has been a reference to a State court to make a determination as to whether a claim in bankruptcy has been compromised, or to determine equitable defenses to such a claim. In *New Jersey* v. *Anderson,* 203 U. S. 483, 491, the Bankruptcy Court reduced the amount of a State's claim for taxes to the amount it found to be due. The present case is the first in which it has been held that when a trustee objects to the allowance of a state's claim the Bankruptcy Court as a matter of law must refer the question for decision to the courts of the claimant State. No wonder that Judge Goodrich in his dissenting opinion referred to the decision of the majority as announcing "a very dangerous doctrine"!

THIRD: The Circuit Court of Appeals has decided ederal question in a way probably in conflict with licable decisions of this Court.

The decision below appears to be in conflict with the sion of this Court in *Gardner* v. *New Jersey, supra.* Court remanded "the cause to the District Court for her proceedings in accordance with this opinion" and opinion found that "the issues (including the Settle- t Act and the contract question) can be resolved by reorganization court on a record more adequate than present one for purposes of review." The Circuit rt of Appeals, disregarding the mandate of this Court, on a record void of any facts essential to its deter- ation, itself determined as a matter of law that the rict Court could not effectively decide the question lved and that the Bankruptcy Court was powerless to with the State's claim until the decree in *Wilentz* v. *drickson* was lifted by the Chancellor. If that were law, this Court would have so declared it at the last in *Gardner* v. *New Jersey,* where the record was sub- tially the same as this.

Likewise the decision of the Circuit Court is probably onflict with the decision of this Court in *Public Utility mission of Ohio* v. *Gas Co.,* 317 U. S. 456, at 463, that:

> "where, as here, no state court ruling on local law could settle the federal questions that necessarily re- main, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible."

In this case, as in that, no State Court ruling on local would finally settle the Federal questions that are lved. Moreover, since this litigation arises under Sec- 77 of the Bankruptcy Act, 11 U. S. C. A. Sec. 205, and

has been pending nearly eight years, considerations of public interest peculiarly call for expedition. *Continental Bank etc.* v. *Chicago Rock Island etc.*, 294 U. S. 648. The Circuit Court of Appeals has fallen into error by ignoring the above quoted rule and by failing to follow the decision in *Gardner* v. *New Jersey* last term.

Wilentz v. *Hendrickson, supra,* commenced September 4, 1941, although tried on affidavits and stipulations of fact, was not decided until July 20, 1943, by the Court of Chancery, and was affirmed by the Court of Errors and Appeals June 22, 1944. It is not likely that such litigation as the Attorney General wishes to bring could be concluded in the State courts in less time than this. Moreover, the New Jersey State courts will not entertain an action for declaratory judgment where there is another adequate remedy at hand. *Empire Trust Co.* v. *Board of Commerce & Navigation,* 124 N. J. L. 406; *Provident Mutual Life Ins. Co.* v. *Unemployment Compensation Comm.,* 126 N. J. L. 348 (E. & A.).

Necessarily a suit in the State courts for a judgment, declaratory or otherwise, would determine whether a compromise had been effected between the State and the debtor under Section 27 of the Bankruptcy Act. Any such action if permitted, and if entertained by the State courts, would amount to a complete surrender to the courts of the creditor State of the inherent, fundamental jurisdiction of the Bankruptcy Court under one of the express provisions of the Bankruptcy Act. If the decision below stands the trustee will be obliged to appear in and defend such declaratory judgment suit as the Attorney General may bring in the State courts. The trustee should not be put to the hazard of the rule that a judgment on the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to

sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 319; *Grub* v. *Public Utilities Comm.,* 281 U. S. 470; *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371.

The decision of the Circuit Court, by giving controlling effect to the decision in *Wilentz* v. *Hendrickson, supra,* also conflicts with the decision of the Circuit Court of Appeals of the Eighth Circuit in *City of Beatrice* v. *Edminson,* 117 Fed. 427, where Judge Sanborn said, at page 431:

> "It is only when the legal conclusion of a State court relative to the constitutionality of a statute of its state is based upon the same facts, upon the same statute, that it controls the decision of the federal courts upon that question. The determination of the issues of fact which conditioned the terms and passage of a statute, like the finding of any other issue of fact, concludes no one, either in a State or in a federal court, except the parties to the action in which the decision is rendered and their privies."

Furthermore, the Circuit Court by giving controlling effect to the decree in *Wilentz* v. *Hendrickson,* based as it is upon findings as to which the Trustee has had no hearing, squarely involves a denial of due process in direct disregard of this court's decisions in *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930).

The Circuit Court decision completely overlooked the rule announced by this Court in *New Jersey* v. *Anderson,* 203 U. S. 483, at 491, that while the meaning of a state statute presents a question of state law yet "where rights, the subject of adjudication by the Federal Courts, have accrued before its construction by the State Court, or the question of contract within the protection of the Federal

Constitution is involved, still a State Court, while entitled to great consideration", cannot conclusively decide the Federal questions in issue.

Finally, the decision below is in conflict with *Woodson* v. *Murdoch*, 22 Wall. 351. The State of Missouri had a claim against the Pacific Railroad Company for $10,500,000, which was compromised under an act of the Legislature for $5,000,000. Thereafter the State attempted to enforce its lien for the compromised taxes and the District Court issued a permanent injunction. On appeal to this Court it was contended that the act of the Legislature under which the taxes were compromised violated the Constitution of the State and hence all acts done pursuant to it were void. This Court affirmed the award of a permanent injunction and held that the Fifth Section of the Missouri Act of March 31, 1868 was not in conflict with that provision of the State Constitution which forbade for any purpose whatever the release of a claim held by the State upon any railroad. The jurisdiction in that case was given to the federal courts because of diversity of citizenship.

It is unthinkable that a court of bankruptcy must make such a complete abdication of its responsibility and jurisdiction as the court below requires.

Prayer

For the foregoing reasons your petitioner prays that a writ of certiorari may issue out of this court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be determined, the full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case, to the end that the case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals

may be reversed, and that petitioner be granted such other and further relief as may be proper.

Dated: September 15, 1947.

WALTER P. GARDNER,
Surviving Trustee of The Central
Railroad Company of New Jersey,

By JAMES D. CARPENTER, JR.,
Counsel for the Trustee,
75 Montgomery Street,
Jersey City 2, New Jersey.

ALEXANDER H. ELDER,
SAMUEL M. COOMBS, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The District Court filed no opinion. The opinion of the Circuit Court is not yet reported but is on file and will be printed by the Clerk with the record below.

Statement of the Case

A summary statement of the case is given in the petition, page 12 above. This matter arises on a motion of the Attorney General for leave to make the Trustees parties defendant in a declaratory judgment suit to be brought in the courts of his own state to determine one objection made by the Trustees to the allowance of the State's claim as a creditor filed in the proceedings. The District Court decided that to grant the motion would result in further and prejudicial delay in the adjudication of the State's claim and in the reorganization of the debtor's estate and would not be in the interest of the estate, or in accordance with the intent of Congress in enacting Section 77 of the Bankruptcy Act, and denied the motion. Although this court held in *Gardner* v. *New Jersey* that the District Court had jurisdiction to decide all the objections that the Trustees had made to the allowance of the State's claim, nevertheless the Circuit Court of Appeals held that the District Court erred as a matter of law in not granting this motion of the Attorney General. If correct the inevitable result of the judgment of reversal will be to delay debtor's reorganization probably for two or three years and will deprive the Bankruptcy Court of jurisdiction granted it by Congress to pass upon a question expressly within the provisions of the Bankruptcy Act.

POINT I

Exercise of discretion by the district judge was involved in the appeal below.

The Circuit Court said that if judicial discretion "were the only question present, the problem could be determined quite simply in favor of the Federal Court". It then held that it was error of law for the Bankruptcy Court not to refer one objection made by the trustees to the allowance of the State's claim to the State courts for decision. Since this Court in *Gardner* v. *New Jersey, supra,* had expressly held that the reorganization court had jurisdiction to pass upon every objection made by the trustees to the allowance of the State's claims, this case falls squarely within the language of the opinion in *Continental Illinois Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S. 648, 677, as follows:

> "It presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised."

In re Youtie, 44 Fed. (2d) 56, CCA 3rd;
Newburger Coal Co. v. *Ruffner Bros.,* CCA 4th, 165 Fed. Rep. 881;
Nisbit, Commissioner v. *Federal Title & Trust Co.,* CCA 8th, 229 Fed. Rep. 644;
Field v. *Kansas City Refining Co.,* 296 Fed. 800.

POINT II

The decree of the Court of Chancery does not, and cannot, affect the debtor or the administration of its estate.

The Circuit Court of Appeals said (p. 6 of the Opinion) that the final decree of the Court of Chancery in *Wilentz* v. *Hendrickson* stated that

> "* * * the Settlement Acts are unconstitutional as to the world. There is the permanent New Jersey injunction against action by the State Treasurer, without whose acceptance of tax payments nothing can be done. Whether any New Jersey court has really passed on the constitutionality of the Settlement Acts as to the debtor and whether any such court has really meant there is no contract will be considered below. At the moment, however, it is enough to point out that an existing judgment of a sovereign power has said both of those things.
>
> "* * * The injunction which is still in effect would render both such assumed actions nugatory."

Again, the court said that the same injunction would bar the way to a tender to the State in fulfillment of the contract.

Again,

> "If either contention of the debtor is sound, the injunction must be dissolved" (Opinion, p. 7).

The decree of the Court of Chancery appears in the Appellant's Appendix, page 92a.

The first paragraph of this decree adjudges that Chapter 290, P. L. 1941 and Chapter 241, P. L. 1942 are unconstitutional.

The second paragraph permanently restrains and enjoins the State Treasurer and his successors in office, their servants and agents, from carrying out or executing any of the provisions of either of said laws, "and from accepting from any railroad taxpayer any acceptance documents, discharges or dismissals, discontinuance, checks or other forms of payment which may be delivered to him or them, or which were heretofore delivered to him or them in purported compliance with" said statutes.

The decision of the Circuit Court disregards the provisions of Section 77(b) and 77(f) of the Bankruptcy Act and ignores the controlling effect of the confirmation of a plan of reorganization. If the Bankruptcy Court orders payments in discharge of the State's claim to be made either in cash or securities, the injunction of the Court of Chancery above quoted would not be violated by the acceptance of the dividend on the claim by the State Treasurer. This injunction did not operate to prevent the State Commissioner of Finance from accepting $15,250,000.00 from the trustee on account of the State's claims on May 6, 1946 (See Order No. 333 and Commissioner's Receipt, Tr. App. 671a, 674a).

Under settled law the decree in the Court of Chancery was binding only upon the parties to that action.

Rutten v. *Paterson*, 73 N. J. L. 467, 475;
City of Beatrice v. *Edminson*, 117 Fed. 427, J. Sanborn.

POINT III

There is no uncertainty as to the law of New Jersey.

Judge Goodrich in his dissenting opinion said:

> "Questions of state law arise in bankruptcy all the time and it is part of the federal judge's ordinary function to deal with them in his stride and when they arise."

In a footnote the Judge lists a great number of cases to sustain this statement.

Here, there is no uncertainty as to the State law as in *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, because it has been settled by the decisions in *In re Voorhees, supra,* and *Wilentz* v. *Hendrickson, supra.* On a trial it may be necessary for the trustee to establish that there was consideration for his settlement with the State. What is adequate consideration under the laws of New Jersey is thoroughly established.

Grandin v. *Grandin,* 49 N. J. L. 508, 514;
National Bank v. *Bloom,* 113 N. J. L. 597, 602 (E & A);
Restatement Law of Contracts, Vol. 1, Sec. 75.

It is submitted that in a case like this the Federal courts will themselves construe the Tax Settlement Acts as well as the New Jersey Constitution. See,

Woodson v. *Murdoch,* 22 Wall. 351;
Meredith v. *Winterhaven,* 320 U. S. 228.

The Railroad Tax Settlement Act of 1941 contains this provision:

"12. Effect of Unconstitutionality.

If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, or application of such provision to other persons or circumstances, shall not be affected thereby."

The same provision was contained in Section 15 of the Amendment of 1942.

Under New Jersey law,

"A decision based upon stipulated facts that results in declaring a law unconstitutional does not wipe the act from the statute books, but merely denies its efficacy to a party who has admitted the existence of a state of facts that in the opinion of the court renders the law unconstitutional" (Pitney, J., in *Rutten* v. *Paterson*, 73 N. J. L. 467, 475).

Moreover, under the decisions of the New Jersey Court of Errors and Appeals, a duly enacted statute is not null and void even though later declared unconstitutional, and actions taken in good faith under the statute are effective, certainly, when taken prior to any challenge. *Allison* v. *Corker*, 67 N. J. L. 596; *Lang* v. *Bayonne*, 74 N. J. L. 455; *Attorney General* v. *McGuinness*, 78 N. J. L. 346; *Eastwood* v. *Russell*, 81 N. J. L. 672; *In re Public Utility Board*, 83 N. J. L. 303 (1912). Especially is this true when the facts applicable to the particular situation were not before the court but only facts contained in a stipulation, which did not represent the facts in the case of the Jersey Central.

See also in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; *Phipps* v. *School District of Pittsburgh* (C.C.A. 3d), 111 Fed. (2d) 393; *J. A. Dougherty's Sons* v. *Commissioner of Int. Rev.* (C.C.A. 3d), 121 Fed. (2d) 700.

While in most of the New Jersey cases cited, as in the case at bar, the action taken was before any challenge had been made, in *Attorney General* v. *McGuinness, supra,* the Court of Errors and Appeals indicated that the existence of a bare challenge does not vary the local New Jersey rule. In that case it said (at pages 371, 372):

> "For such mistaken conception leads to the radical error, that, if duly challenged, a legislative act will be sustained only when it is demonstrably constitutional. Such a notion in effect supplements the constitution by requiring the affirmative concurrence of all three departments of the government where that instrument of the organic law requires but two, viz., the legislative and the executive * * *."

The debtor's relinquishment of all further rights to contest in the State tribunals and Courts, whether by express waiver or by allowing time to lapse, was first made under authority of Order No. 123 in acceptance of the 1941 Settlement Act, three weeks before the Attorney General filed his information action. The 1942 Act was amendatory of and supplemental to the 1941 Act, and Order No. 163, responsive to the 1942 Act, was necessary to protect a change in status already made in reliance upon the earlier Act. Such a state of affairs justified, if indeed, it did not require, the Bankruptcy Court to order compliance upon the principle that the legislative offer was the law of the state until declared unconstitutional. (See Order 163, 29a.)

Wilentz v. *Hendrickson* (*supra*), was decided on a stipulation of facts made between the State's Attorney General and Treasurer. The decision of the Court of Errors and Appeals, based on this stipulation, held that the Tax Settlement Acts amounted to an appropriation of money to corporations in violation of Art. 1, par. 20 of the State Constitution.

In reaching its conclusion the Court said (at p. 253):

"Thus if the state has a vested right in and to the tax debt (delinquent interest), then unless the remission, cancellation and abatement of that right is supported by a 'legal, equitable or moral consideration' (*In re Voorhees*, 123 N. J. Eq., 142) the challenged statutes clearly contravene, in spirit and in fact, the constitutional limitation (Art. 1, par. 20) invoked."

Again, at page 260, the Court said:

"Nor do we find anything in the proofs to support a moral or equitable consideration."

A trifling inconvenience to the one party or a slight advantage to the other is sufficient to constitute lawful consideration. *National Bank* v. *Bloom*, 113 N. J. L. 597, 602 (E. & A.). " 'Consideration' in the legal sense of the word, of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise." *Phoenix Mutual Life Insurance Company* v. *Raddin*, 120 U. S. 183.

Restatement of the Law of Contracts, Vol. 1, Sec. 75.

The legislature in paragraph 15 of 1942 Tax Settlements, New Jersey (App. 694-698a), specified the consideration which it determined the State was receiving.

There is no force to the contention of the Attorney General, which has repeatedly been made, that there was no settlement effected with the State because of his wilful refusal to approve the settlement papers delivered under the 1941 Act.

It is a principle of elemental justice that if a promissor (offeror) is himself the cause of the failure of performance, either of an obligation due him or of the condition

upon which his own liability depends, he cannot take advantage of the failure.

Williston on Contracts, Vol. III, Sec. 677, page 1952;
United States v. *Peck,* 102 U. S. 64;
Greenwood v. *Watson,* 171 Fed. 619;
United States v. *Behan,* 110 U. S. 338;
Tanenbaum v. *Francisco,* 110 N. J. L. 599;
Realty Acceptance Corp. v. *Montgomery* (C. C. A. 3rd), 51 Fed. (2d) 636;
Restatement of Contracts, Sec. 63.

It was on September 4, 1941, three weeks after the trustees had on August 11, 1941 filed their undertakings, waivers, etc., with the State Treasurer and State Comptroller, that the Attorney General commenced his information suit in the Court of Chancery attacking the constitutionality of the Settlement Acts (App. 55a, Par. 16).

POINT IV

The Decision of the Circuit Court of Appeals denies the supremacy of the Bankruptcy Court over the Courts of the States in matters affecting the Estate.

In its decisions in *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478 and *Mangus* v. *Miller,* 317 U. S. 178 this court, while holding that questions concerning the title to lands were properly referrable to state courts on the facts of those two cases, was careful to state that meanwhile the status quo in bankruptcy should be preserved.

It is impossible to preserve the status quo here because the state asserts that interest on its claim is running

at the rate of 1% per month, or over $1,000,000 per year, if the state's contentions should ultimately prevail.

When the Circuit Court of appeals said

> "There is the final New Jersey decree stating the Settlement Acts are unconstitutional as to the world. There is the permanent New Jersey injunction against action by the State Treasurer, without whose acceptance of tax payments nothing can be done."

it ascribes to the decree force and effect that is recognized by no authorities.

Moreover it is a flat denial of the supremacy of the bankruptcy act (Sec. 77) in railroad reorganizations, and in effect is a holding that State law is supreme unless and until the State Court elects, on petition, to open its decree.

Again, when the opinion declares that a decision in favor of debtor by the Bankruptcy Court and a tender of payment by the Trustee would be rendered nugatory by the State Court Injunction it reiterates its doctrine of supremacy of state over bankruptcy law.

The utter fallacy of the reasoning on which the judgment sought to be reviewed is premised is shown in footnote 2 to the opinion which indicates that the Court was of the belief that the State's claim (filed December 10, 1940) was filed under the provisions of the Settlement Acts (passed in 1941 and 1942) and questions the power of the State to file such claim in the bankruptcy proceedings. It ignores the facts as contained in the claim actually filed (App. 75a), as well as the statements of this Court in *Gardner* v. *New Jersey* that

> "he who invites the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure;" and

> "The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res."

When the Court below said (Pg. 11 of the opinion) that debtor's contentions that the state's claim was compromised under Section 27 of the Bankruptcy Act (11 U. S. C. 50) and its claim of equitable defenses are "contentions of no moment on this appeal" it ignored the real bankruptcy issues involved and substituted as the only question at bar whether there was a contract under state law, in the language of the Attorney General in his motion and points on appeal.

The Trustee contended below that even though the Settlement Acts were held to be unconstitutional by the State Courts in *Wilentz* v. *Hendrickson,* nevertheless the Trustees, by accepting the offer contained in Section 7 of the 1941 Act and in the 1942 Act, with the approval of the Court, and complying therewith before the question of constitutionality was raised or determined, had secured rights and benefits for the debtor's estate which the later state court decree could not affect under the decisions in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374; *Allison* v. *Corker,* 67 N. J. L. 596; *Lang* v. *Bayonne,* 74 N. J. L. 455; *Attorney General* v. *McGuinness,* 78 N. J. L. 346; *Eastwood* v. *Russell,* 81 N. J. L. 672 and *In re Public Utility Board,* 83 N. J. L. 303. The Circuit Court of Appeals announces a new doctrine, to wit: that the decision in *Wilentz* v. *Hendrickson,* which merely held the Settlement Acts to be unconstitutional, also overruled the line of cases which hold that a duly enacted statute is an operative fact and that actions taken in good faith under it before it is held void are effective. There is no judicial sanction for such a doctrine.

In brief, all through the opinion of the Circuit Court runs the fallacious notion that before the debtor's estate

can obtain a decision on the numerous and vital bankruptcy questions involved, the injunction against the State Treasurer must be dissolved.

Probably the most harmful finding of the Circuit Court (Pg. 8) is that a decision of the Bankruptcy Court would contravene the State Court injunction and that it was error of law for the District Judge to deny the motion of the Attorney General for leave to join the Trustee as defendant in an action to be brought in a State Court. This finding concedes the supremacy of the State Court injunction over Debtor's estate; it would result in permitting a State Court to pass upon questions as to the amount for which a state's claim in bankruptcy should be allowed, and finally would delay debtor's reorganization, perhaps for years.

The State's claim is so large (now approximately $16,000,000) that reorganization cannot be effected until it is finally determined by the Bankruptcy Court.

It is respectfully submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the Third Circuit as prayed for in the annexed petition.

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